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Scott, P. F. (2014) On 'domestic' law and the law of human rights: *Osborn v The Parole Board*. *King's Law Journal*, 25(2), pp. 147-154.

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Deposited on: 16 November 2016

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## On 'domestic' law and the law of human rights: *Osborn v The Parole Board*

One consequence of the Human Rights Act 1998 (HRA) has been the partial displacement of the common law grounds of judicial review from their prior position at the front and centre of the public law stage.<sup>1</sup> Nowadays, cases are brought and judgments handed down almost entirely on human rights grounds, with the relevant common law principles invoked secondarily, if present at all. As such, it might be thought that the relatively aggressive development undergone by the common law principles of review throughout the 1990s had gone to waste.<sup>2</sup> If this has been true, it should no longer be. In *Osborn v The Parole Board*,<sup>3</sup> the Supreme Court took the opportunity not only to clarify one facet of those common law rules (the circumstances in which procedural fairness requires that an individual be afforded an oral hearing) but also the relationship between the common law and the law of human rights under the HRA. The effect of this (re)consideration will be to return the common law grounds of review to their rightful place at centre stage and in doing so, perhaps, safeguard the future of the system of human rights protection which has in recent years obscured them. It is fitting that it is in the field of prisoners' rights - cases dealing with which had been the site of some of the most assertive pre-HRA decisions<sup>4</sup> - that this reappraisal has been made.

The three applicants here were each the subject of a decision by the Parole Board. Two were prisoners serving indeterminate sentences whose minimum terms had expired; the third was a determinate sentence prisoner who had been released on licence and recalled. In each case, the applicant had been denied an oral hearing. James Reilly, one of the indeterminate sentence prisoners, had made successful claims at common law and under the HRA,<sup>5</sup> but the decision on both points had been reversed on appeal.<sup>6</sup> The other applicants had been unsuccessful both at first instance and on appeal.

The issue of whether subjects of a decision have the right to an oral hearing is one aspect of the general requirement of procedural fairness. Oral hearings are not, as a rule, a necessary feature of fair decision-making; they are not "the very pith of the administration of natural justice."<sup>7</sup> This approach has seen oral hearings denied even in circumstances where the consequences of the decision for the individuals who were the subject of it were relatively severe.<sup>8</sup> Fairness will require oral hearings most often when the decision-maker must decide a disputed issue of fact relevant to its decision, but the courts have frequently

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<sup>1</sup> This is in keeping with the sense of the HRA as having effected a "shift in gear" in the ongoing transformation of UK public law by human rights principles: Tom Hickman, *Public Law after the Human Rights Act*, (Hart Publishing, 2010) 1. See also Tom Poole, 'The Reformation of English Administrative Law' (2009) 68 *Cambridge Law Journal* 142, 145 suggesting that the HRA facilitated a "deep, structural" change; that it "squared the circle between the desire for a more upfront application of substantive judicial review and the constitutional need for Parliament to sanction such a development."

<sup>2</sup> *R v SSHD, ex parte Leech* [1994] QB 198, [1993] 3 WLR 1125; *R v SSHD, ex parte Pierson* [1998] AC 539, [1997] 3 WLR 492; *R v SSHD, ex parte Simms* [2000] 2 AC 115, [1999] 3 WLR 328; *R v SSHD, ex parte Daly* [2001] UKHL 26.

<sup>3</sup> [2013] UKSC 61.

<sup>4</sup> Each of the cases referred to in note 2, above, relates to the rights of prisoners.

<sup>5</sup> [2010] NIQB 46.

<sup>6</sup> [2011] NICA 6; [2012] N.I. 38.

<sup>7</sup> *R v Local Government Board, ex parte Arlidge* [1914] 1 KB 160, 192-3, cited with approval by Wolf LJ in *Lloyd v McMahon* [1987] 1 AC 625, at 670.

<sup>8</sup> *Lloyd v McMahon* [1987] 1 AC 625.

been more generous when deciding whether prisoners have a right to an oral hearing before the Parole Board. The need to assess risk, alongside the potential for explaining away even facts which were not in dispute, had for example seen a hearing granted to a life sentence prisoner whose parole had been revoked in the last case of this sort to be decided by the highest court.<sup>9</sup>

In deciding the present case, Lord Reed (with whom the other four members of the court agreed) clarified three important points regarding procedural fairness in general. First, he confirmed that a court deciding such a question must decide for itself if the procedure employed was fair; contrary to what had been said in relation to two of these three applicants, it was not sufficient to examine the reasonableness of the original decisions as to what fairness required according to the *Wednesbury* standard.<sup>10</sup> Second, the purpose of a fair procedure is not merely to assist a primary decision-maker in arriving at the ‘correct’ conclusion: such a procedure also promotes the dignity of those whose interests are at stake by permitting them to participate. This would seem to counsel against any complacent argument that a fair process need not have been employed because to do so would have made no difference to the outcome. Third, procedural fairness buttresses the rule of law by helping to ensure congruence between legal rules and the decisions of those bound by them, and may in fact save money in the long run where it leads to better decision making - the assumption that not providing a hearing is therefore the cheaper option is not only an illegitimate ground for refusing a hearing, but does not in fact hold.<sup>11</sup>

Beyond this clarification, however, Lord Reed was content to follow the approach of the House of Lords in *R (West) v Parole Board*<sup>12</sup> where it was held that an oral hearing is necessary where there are facts in dispute but also in a range of other circumstances. Importantly, Lord Hope had therein emphasised that one cannot be certain if a disputed issue of fact will prove determinative at the point at which one is deciding whether or not to grant a hearing: the question is therefore not whether the decision *does* in fact turn on the disputed issue of fact, but whether it is likely to do so.<sup>13</sup> Following the decision in *West*, the Parole Board initially adopted a policy of granting a hearing to any recalled prisoner who requested one: this initial generosity was undone by a 2007 rule change which attempted to limit the availability of oral hearings to those who were unambiguously required to have them by the terms of the decision in *West*.<sup>14</sup> Both the decision in *West* and Lord Reed's clarifications feed into the guidance offered in *Osborn* as to when procedural fairness will require an oral hearing in the context of applications for release or transfer to open conditions. Though explicitly non-exhaustive, the guidance is extensive and any future considerations of the question will certainly start, and most likely end as well, with this careful enumeration of possible scenarios and relevant factors. As if to emphasise this, Lord Reed places a summary of this same guidance at the opening of his judgment. The starting point is the rule that an oral hearing should be held “whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake.”<sup>15</sup> Relevant to the question will be the existence of a factual dispute or an attempted mitigation which must be heard orally to be judged; the need for an oral

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<sup>9</sup> *R (West) v Parole Board* [2005] UKHL 1; [2005] 1 W.L.R. 350, at [35].

<sup>10</sup> [65].

<sup>11</sup> [64]-[72].

<sup>12</sup> [2005] UKHL 1; [2005] 1 W.L.R. 350.

<sup>13</sup> [67]-[68].

<sup>14</sup> *Osborn*, at [14].

<sup>15</sup> [81]

hearing in order to assess risk; or, if to ratify the paper decision would be unfair in light of representations made.<sup>16</sup> Applied to the three cases at issue here, the guidance leads to a holding that the requirements of procedural fairness were not met.<sup>17</sup> The attempt by the Parole Board to scale back the availability of oral hearings to the minimum explicitly required by *West* had therefore led it to act in a procedurally unfair manner. As such, in future the Parole Board would be advised to err on the side of caution when deciding whether or not to grant a hearing - the on-going evolution of the common law makes adherence to the lowest common denominator inherently problematic.

Only having made this finding does Lord Reed turn to the issue upon which the applicants placed the emphasis of their submissions: the question of the compatibility of the refusal of oral hearings with article 5(4) of the European Convention on Human Rights (ECHR), made relevant by the s.6(1) HRA requirement that public authorities do not act incompatibly with the Convention rights. In *West*,<sup>18</sup> Lord Bingham had concluded that a Parole Board process conducted in conformity with common law fairness would meet the requirement, found in article 5(4), that an individual deprived of liberty be “entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” On review of relevant authority - *Hussain v United Kingdom*,<sup>19</sup> dealing specifically with a prisoner serving an indeterminate sentence whose tariff had expired - Lord Reed concluded that, in light of the importance of what is at stake and the need to assess dangerousness in order to make a decision, article 5(4) will usually require that indeterminate sentence prisoners who have served their minimum terms are permitted an oral hearing. The failure to provide one meant that the present claims also succeeded to the extent that they were brought on human rights grounds.

Lord Reed’s closing proposition on this point seems, however, problematic. He suggests that because the board “failed in its duty of procedural fairness to the appellants at common law, it follows that it also failed to act compatibly with article 5(4).”<sup>20</sup> Understood as an addendum to what had come before, this is correct: the common law requires a hearing, as does article 5(4) - having breached the common law rule in refusing to provide one, the Parole Board has by definition also violated the applicants’ Convention rights. If, however, it is understood as a more general proposition as to the relationship between the two legal rules, it would seem to suggest that the common law does not and will not impose more stringent limits than the Convention rights. Such a position would be unfortunate: the common law can and should, where appropriate, impose limits beyond those of the ECHR. Not least because to do so is to disrupt the cheap but tempting moral heuristic that assesses an action as acceptable, or even ‘good’, merely because it does not violate the Convention rights. The possibility should therefore be explicitly left open.

Osborn has an inherent importance deriving from its status as one of the relatively infrequent administrative law cases raising issues of common law grounds of review to arrive in the Supreme Court, magnified by the careful guidance on the specific issue of fairness and oral hearings in this context. Though limited to a context - prisoners’ rights - in which the courts have for several decades been concerned to ensure the common law is at its most robust, it will likely also prove influential outside of

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<sup>16</sup> [82]-[96], summarised at [2].

<sup>17</sup> [97]-[100]

<sup>18</sup> [37]

<sup>19</sup> (1996) 22 EHRR 1

<sup>20</sup> [113]

that context. The case has significance beyond the topic of procedural fairness, however, due to Lord Reed's account of the relationship between domestic law and the scheme of human rights protection under the HRA and the ECHR.<sup>21</sup> Early scholarship on the HRA devotes considerable energy to the question of whether the act creates new domestic law remedies for breach of the (international) Convention rights or institutes a body of new domestic law rights. This question derives importance from the minimalism of the s.2 HRA "take into account" requirement and the *Ullab* (sometimes 'mirror') principle by which the courts have come to exercise their discretion in fulfilling that duty.<sup>22</sup> Here, Lord Reed is clear and strident. Convention rights, he notes, are formulated at a high level of generality and can by definition only be secured by a much more detailed body of domestic law.<sup>23</sup> Being so under-determined as to be incapable of guiding the conduct of individuals, the ECHR "cannot... be treated as if it were Moses and the prophets."<sup>24</sup> The first question to be answered therefore, in any case potentially raising human rights issues, is whether or not the relevant domestic (non-human rights) law has been complied with. For this reason, applicants who skip immediately to the Convention rights (as many, including Osborn, do) neglect the remedies with which domestic law might furnish them. This neglect contributes to the delegitimation of the common law rules, particularly as compared to the human rights law which is thereby given undue prominence. Only where the domestic law fails to "reflect fully the requirements of the Convention" - where it has been complied with and yet there is nevertheless a violation of the Convention rights - need anything further be done.<sup>25</sup> Even here we do not immediately turn to the HRA: it may still be possible for the common law to be developed in a fashion which enables it to secure the Convention rights, as was done with growing frequency and confidence in the years immediately prior to incorporation. Only in those cases where this cannot be done must we look to the specific guarantees found in the HRA.

The effect of this account is to suggest that many cases argued under the HRA should instead be advanced in the first place on common law grounds: Lord Reed provides a series of examples of where this approach has been taken and been successful – amongst them *R v SSHD, ex parte Daly*,<sup>26</sup> *A (No.2)*<sup>27</sup> - to which one might add the decision in *Bank Mellat v HM Treasury (No. 2)*.<sup>28</sup> In approaching the issue as they did - i.e., by instead starting from the HRA - the applicants here have acted as though, because the Convention is relevant to their cases, "analysis of their problem should begin and end with the Strasbourg case law."<sup>29</sup> But, in fact, this misunderstands the relationship between domestic and human rights law over which commentators have quarrelled: the rights are not merely an aspect of domestic law, but one which rather than being closed off and separate, seeps into the common law and so at times ensures the

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<sup>21</sup> This opposition between 'domestic law' and the HRA/ECHR is problematic in light of the fact that the regardless of the specific status of the Convention rights, the HRA is unambiguously an aspect of domestic law. In fact, it contributes to exactly the sort of impression Lord Reed desires to counter. It is, however, the terminology employed in Osborn, and so it is adopted here.

<sup>22</sup> *R. (on the application of Ullab) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323, at [20].

<sup>23</sup> [55].

<sup>24</sup> [56].

<sup>25</sup> [57].

<sup>26</sup> [2001] UKHL 26; [2001] 2 A.C. 532.

<sup>27</sup> [2005] UKHL 71; [2006] 2 A.C. 221.

<sup>28</sup> [2013] UKSC 39; [2013] 3 W.L.R. 179.

<sup>29</sup> [63].

validity of those norms with the Convention rights without the latter having to be explicitly invoked. Lord Reed quotes Lord Justice-General Rodger: the rights “soak through and permeate the areas of our law to which they apply.”<sup>30</sup> To comply with the Convention rights, therefore, it will often, and perhaps more often than not, be sufficient to adhere to the rules of the common law, whose existence in domestic law predates and survives the HRA.

These remarks are of the highest importance, calculated in the first place to bring the less glamorous aspects of domestic administrative law back to prominence in the appeal courts. They are not, though, made in a vacuum. The image problem of existing human rights law (by which its critics usually mean the HRA) is, in no small part, attributable to the perception that it is something ‘foreign’ - not merely separate from but in active and frequent conflict with domestic traditions. It is for this reason that much of the talk about reforming the system of rights protection amounts to little more than a rebranding exercise; slapping the label ‘British’ on a rejigged HRA, perhaps alongside a reduction of the level of protection offered to foreign nationals and other supposed ‘undesirables’. This (dangerous) impression is only bolstered by legal argument which implicitly accepts the opposition between domestic law and the seemingly ‘exceptional’ Convention rights, with the first question asked being whether the former is compatible with the latter. As Lord Reed’s examples suggest, domestic law will frequently provide a rights-compliant outcome - if it does not do so more often, the fault may lie with those who look past it in their haste to advance a case based on the ECHR and in doing so deny the common law the opportunity to evolve to meet their requirements. If the Convention rights were instead held in reserve for cases where there remains an incompatibility even after the relevant domestic law has been identified and applied, then the common law grounds of review would regain their rightful place and governments faced with a decision they disliked required to squarely confront the issue rather than attributing it to some malign external influence. Not all cases would be resolvable on this basis alone, but more than might be imagined. The common law, Lord Reed suggests,<sup>31</sup> was not placed in stasis in 1998: it continues to develop alongside the new rules then introduced, and there is no reason to believe that it should have developed any less quickly and dramatically than it did throughout the 1990s - in fact, the opposite seems more likely, given that “the Act provides a number of additional tools enabling the courts and government to develop the law when necessary to fulfil those guarantees” which the Convention rights provide.<sup>32</sup>

Lord Reed’s approach to the issue is therefore clear and admirable, calculate to achieve the fullest possible protection of human rights while maximising esteem for the domestic law and the remedies it (already) provides. The difficulty it raises is not to be found in its own terms, but in the contrast it provides with previous dicta, some of them of considerable authority, regarding the common law’s relationship to human rights law. Lord Bingham, for example, once suggested that the enactment of the HRA can be taken to suggest that “Parliament intended infringements of the core human (and constitutional) rights to be remedied under it and not by development of parallel remedies [at common law],”<sup>33</sup> endorsing a position diametrically opposed to that taken by Lord Reed here. But if Lord Reed’s approach is new to the Supreme Court, it is not new to Lord Reed himself, who has often championed a distinctive approach to this question. In a speech to the Scottish Public Law Group in 2011, he argued that the domestic law

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<sup>30</sup> *HM Advocate v Montgomery* 2000 JC 111, 117, quoted at [63].

<sup>31</sup> Citing the views of Toulson LJ in *R (Guardian News and Media) v Westminster Magistrate’s Court* [2012] EWCA Civ 420; [2013] Q.B. 618, at [88].

<sup>32</sup> [57].

<sup>33</sup> *Watkins v Home Office* [2006] UKHL 17; [2006] 2 A.C. 395, at [26].

“should be the starting point where the Convention is engaged, and it will usually also be the finishing point.”<sup>34</sup> And, in going on to suggest that situations where domestic law is not Convention-compliant will usually be matters “governed by legislation”, he implicitly acknowledged both the ability of the common law to develop in a fashion which achieves compliance where necessary and the greater likelihood that Parliament will actively seek to act incompatibly with the Convention rights than that the common law will be incompatible. By now making similar remarks in a Supreme Court judgment and attracting the agreement of a strong panel of his fellow justices, Lord Reed would appear to have put in place the foundations of a new approach to the interaction of domestic and human rights law.

If the political movement against the HRA in recent years has lead judges to think twice before declaring executive action unlawful, there is considerable reason for concern. If, on the other hand, it has brought about a situation in which the judiciary now considers more carefully the path by which it reaches that conclusion and the emphasis placed upon different but perhaps complementary legal norms, then this would seem to be both constitutionally proper and in fact positively desirable, not least because clarification of this point underlines that the repeal or reform of the present system of human rights as implemented by the HRA is no panacea: better that those who seek such repeal understand this now than that they later find out that they have expended considerable political capital to little end.<sup>35</sup> The domestic common law was and is a more worthy adversary than is sometimes remembered,<sup>36</sup> particularly in light of its evolution in the 1990s and particularly where the rights of prisoners are concerned. The common law has become more, not less, of an obstacle in the meantime, yet is not vulnerable to the full range of the deflection tactics employed against human rights norms. The disadvantage of a reliance upon the common law to protect human rights, of course, is that it is subject to statutory over-ride and therefore unacceptably contingent - significantly more so than the protection of human rights under the HRA, which is buttressed by an international dimension of a sort alien to the common law.<sup>37</sup> Statutory override of the common law, though, requires a successful deployment of the political process in order to produce a suitably explicit statutory authority and the associated payment of what Lord Hoffman once dubbed the “political cost.”<sup>38</sup> If that cost is not sufficient to prevent the legislature trampling on fundamental rights (or permitting the executive to do so), there remain in the law reports the infamous Jackson dicta, foreseeing a point at which the common law might need to develop in a fashion far more radical than Lord Reed here describes, so as to place limits even upon parliamentary supremacy.<sup>39</sup> The sad truth, however, is that if that “political cost” is not a meaningful disincentive, the shortcoming is likely that of the political process rather than the law: whether relying on the common law or the HRA, there are inevitable limits to what the courts can do to protect rights.

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<sup>34</sup> Lord Reed, ‘The Interrelationship of Strasbourg and UK Human Rights Law’, speech delivered to the Scottish Public Law Group, Edinburgh, 18th March 2011.

<sup>35</sup> Human rights reform is a moving target, with new proposals emerging and fading away with considerable frequency. Though now out of date and unlikely to directly inform the fate of the HRA, the final report of the Bill of Rights Commission provides a useful overview of key issues: Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (2012).

<sup>36</sup> The neglect of the common law has not been total: the argument, both descriptive and normative, for a heightened constitutional role for the common law has recently been made with renewed vigour by Trevor Allan. T.R.S Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013).

<sup>37</sup> In particular Article 1 of the ECHR which, though not itself incorporated into domestic law, requires High Contracting parties to “secure to everyone within their jurisdiction the rights and freedoms” which are defined in the Convention.

<sup>38</sup> *R v SSHD, ex parte Simms* [2002] 2 AC 115, 121.

<sup>39</sup> *Jackson v Attorney-General* [2005] UKHL 56, at [102], [104]ff., and [159].